NO. 2973

UNITED STATES

Circuit Court of Appeals

For the Ninth Circuit

CYRUS F. SHELDON,

Appellant,

vs.

GUS MESSERSCHMIDT, CHARLES QUACKENBUSH and the JUNEAU CONSTRUCTION COMPANY,

Appellees.

Brief of Appellees

Upon Appeal from the United States District Court for the District of Alaska Division No. 1.

HELLENTHAL & HELLENTHAL,
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STATEMENT OF FACTS

This suit was brought by the appellant, Cyrus F. Sheldon, to enjoin the maintenance of certain improvements placed by the defendants upon the tide lands lying in front of land claimed by the plaintiff, which tide lands are situate a short distance northerly from the town of Juneau, Alaska; in the complaint it is alleged that the plaintiff is the owner of certain uplands; that the defendants have placed piling and structures upon said tide lands and have thereby deprived the plaintiff of his right of ingress and egress to and from said upland to and from the navigable waters of Gastineau Channel; in the answer the defendants deny all of the allegations contained in the complaint and by way of new matter aver that the structures referred to in the complaint as being built by them are on the tide flats of Gastineau Channel below the line of mean high tide; that said structures and premises do not interfere with plaintiff's right of ingress to and from deep water of Gastineau Channel; that the plaintiff has never used his right of ingress and egress to and from deep water and that the defendants are informed and believe, and there-

fore allege, that the plaintiff does not intend to use said right of ingress and egress.

To this answer a demurrer was filed on the ground that it does not state facts sufficient to constitute a defense (record page 9), which demurrer was overruled (record page 10). The overruling of which is assigned as the first error.

To this answer a reply was filed, denying that all of the structures referred to in the complaint were below the line of mean high tide and denying that the same did not interfere with the plaintiff's right of ingress and egress.

The reply further challenges the sufficiency, as a matter of law, of the other allegations of said affirmative defense being the allegations, in which it is averred that the plaintiff has never used his right of ingress and egress and that plaintiff does not intend to use said right of ingress and egress. (record page 11.)

Upon the issues thus made by the pleadings, the case came to trial, at which the plaintiff offered testimony tending to show that he was the owner of 47.34 acres of land bordering on Gastineau Channel, and that defendants' structures were on the tide lands in front thereof, the official plat of which was received in evidence, marked plaintiff's Exhibit "D" and is found on page 39 of the printed record, from which it appears that plaintiff claims to be the owner of upland having a water frontage on Gastineau Channel of 31.20 chains, 2,065.14 feet.

From the evidence offered, it appears that defendants' structures extend over about 177 feet of appellant's frontage, (record pages 25 and 26) that the plaintiff resides on his land, except during the time he is doing his assessment work (record page 28) and that the only improvements in the way of buildings or structures upon said land owned by the plaintiff is the house in which he resides, which is marked "Sheldon's House" on said Exhibit "D" (record page 26). That the tide lands on which the structures were built by the defendants are situate about 700 or 800 feet southeasterly from said plaintiff's house (record page 27); that the uplands adjoining the tide lands in dispute are wild, unimproved lands, on which the timber has been slashed but from which the stumps and under brush have not been removed (record pages 27 and 30).

The evidence is not plain as to whether or not all of the structures are entirely upon the tidelands but since this action was brought for tide lands and as a court of equity would have no jurisdiction to dispossess a person from uplands, it becomes unnecessary for us to consider if any structures were placed above the line of mean high tide.

The plaintiff did not offer any evidence tending to show that he had any use for any of the tide lands lying in front of the said uplands or that he ever intended to make any use of said tide lands or any part thereof. Finding in Judgment (record page 13).

At the close of the testimony the defendants moved for a non-suit on the ground that the plaintiff had not offered any evidence to show that the defendants' structures interfere with plaintiff's right of ingress and egress and that plaintiff had not shown any necessity for the use of his right of ingress and egress (record page 30) which motion was granted (record page 31). The granting of which motion has been assigned as the second error.

Whereupon the court made a finding that plaintiff had introduced no evidence that defendants had interfered or were about to interfere with plaintiff's right of ingress and egress from or to the uplands to or from navigable water, nor that the plaintiff had used or is about to use his said right of ingress and egress and decreed that the cause be dismissed, which said finding above referred to was incorporated into and made a part of the judgment in the above entitled cause (record page 13), the making and entering of which judgment and decree is assigned as the third and last error made by the court in the said cause.

ARGUMENT AND AUTHORITIES

In the affirmative answer the defendants allege that the plaintiff has never used and does not intend to use said right of ingress and egress. This allegation is not denied in the reply, and is, therefore, admitted by the plaintiff and is equal to a finding of fact.

Fush vs. East Portland, 6 Ore. 282;
Jennings vs. Frazier, 80 Pac. 1011.

The only issue raised by the pleadings are:

First: Whether or not the plaintiff is the owner of the upland described in the complaint, on which issue no finding was requested and no finding was given and no finding was necessary to sustain the judgment.

Second: Whether or not the defendants' structures interfere with the plaintiff's right of ingress and egress as stated in the complaint, upon which issue the court made a finding that there was no evidence showing that defendants have interfered with, or are about to interfere with plaintiff's said right or ingress and egress, which finding is included in the judgment aforesaid and to which finding no exception was taken. Therefore, whether or not the same is supported by the evidence cannot be considered.

The evidence, however, clearly justifies and supports said finding and this finding, under the case of Barron vs. Alexander, 206 Fed. 272, is sufficient to support the judgment.

The title to shore land in the territory of Alaska has been expressly reserved by Congress for the future state, by part of section 1 and and the last proviso of section 2 of the Act of May 14, 1898, which are as follows:

> "That no entry shall be allowed exending more than eighty rods along the shore of any navigable water and along such shore a space

of at least eighty rods shall be reserved from entry between all such claims and that nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district. And it is further provided that no homestead shall exceed eighty acres in extent."

"That nothing in this act contained shall be construed as impairing in any degree the title of any state that may hereafter be erected out of said district or any part thereof to tide lands and beds of any of its navigable waters, or the right of such state to regulate the use thereof nor the right of the United States to resume possession of such lands, it being declared that all such rights shall continue to be held by the United States in trust for the people of any state or states why may hereafter be erected out of said district."

The appellant, as a littoral owner, has no property right in the soil of the fore shore or tide lands abutting his upland, the litoral owner's right being the right of ingress and egress, which is a privilege without profit, which the littoral proprietor has a right to enjoy in respect to his upland in and over the fore shore or tide lands the property of all the people by reason whereof the latter are obliged to suffer or refrain from doing something on their own property for the advantage of the littoral owner, a charge upon the property of the people for the benefit of the littoral proprietor.

The right of the littoral proprietor is an easement, being a liberty or privilege in the land of the public existing distinct from the ownership of the soil.

> "The owner of the uplands cannot exercise his easement or right of access to the channel in such a way as to prevent other parties to whom the sovereign has granted the bed of the river or some portion of it, from using their own property in a reasonable way. The erned by the general rules of law applicable to easements and servitudes generally."
>
> *Hedges vs. West Shore R. R. Co.* 44 N. E. 691.

We will consider this right of the appellant,

First: With reference to the law of easements in general; and,

Second: With reference to his particular right of ingress and egress to and from his upland to and from navigable water.

UNDER THE LAW OF EASEMENTS IN GENERAL.

Nothing passes from the servient estate but what is requisite to the fair enjoyment of the easement, and, notwithstanding the existence of an easement, the owner of the dominant estate retains the right of full dominion and use of his land except insofar as his use is limited by a reasonable use of the easement. This right need not be expressly reserved for it is not granted. The owner

of the servient estate must use his estate in such a manner as to not prevent or interfere with the reasonable enjoyment of the easement.

Smith Canal or Ditch Co. vs. Colorado Ice Co. 82 Pac. 940;
3 L. R. A. (N. S.) 1148, and note;
also note 100 Am. Dec. 118.

What may be considered a proper and reasonable use of the owner of the fee as distinguished from an unreasonable and improper use, as well as what may be necessary to the beneficial use and enjoyment of the easement, are questions of fact to be determined by the trial court or jury and which necessarily depend largely upon the extent and lawful mode of user of the particular easement.

Harvey vs. Crane, 85 Mich. 316; 48 N.W. 582;
note 48 L. R. A. (N. S.) 87, 89;
Cooley Const. Lim. Sec. 691.

The owner of the servient estate over which there exists an easement of a right of way is not precluded from building over said right of way or tunnelling underneath the same, as long as he does not prevent or interfere with the reasonable use of the right of way.

Bitella vs. Lipsin, 80 Conn. 497;
69 Atl. 21;
16 L. R. A. (N.S.) 193 and note;
Notes 88 Am. Dec. 281; 100 Am. Dec. 118;
3 L. R. A. (N.S.) 463.

The owner of a servient estate over which there exists an easement, which is not susceptible of the use for which it was dedicated, will not be restrained by injunction, since there can be no injury to such easement.

2 *Beach Equity Jurisprudence* Sec. 713 and cases cited.

If the person entitled to the use of an easement has other convenient means of access and will not suffer material damages, equity will not interfere.

2 *Beach Injunction*, Sec. 1017 and cases cited.

And owner of land to which an easement is appurtenant cannot enjoin the maintenance of obstructions to said easement if he is out of possession of the land to which the easement is appurtenant, since he has no use for the easement.

Walker vs. Clifford, 29 S. 588;
128 Ala. 67;
86 Am. St. Rep. 74.

The owner of an easement, under which he is given a right to go on the servient estate when necessary to repair his buildings, cannot enjoin the owner of the servient estate from erecting a building that will interfere with the right given under the easement without showing that it is necessary to repair his building.

Phipp vs. Johnson, 99 Mass. 26.

Likewise, the owner of a prior and first usufructary right to water who is not in a position

to make beneficial use of the water, cannot enjoin a person from using said water.

Nevada Canal Co. vs. Kidd, 37 Cal. 284, 310, 311, 319.

From the foregoing, it will appear that the owner of an easement which is obstructed, must show, before he is entitled to relief by injunction,

First: That he is the owner in possession of the dominant estate and that he has an easement which is appurtenant thereto;

Second: That he is desirous of using said easement;

Third: That the use contemplated to be made and the method of availing himself of the use is reasonable;

Fourth: That the reasonable use of his easement has been interfered with.

The appellant although having offered testimony tending to support the first of these requirements, having admitted yb the pleadings that he is not desirous of using said easement, fails to comply with the second requirement and has wholly failed to show that the use contemplated to be made and his method of use was reasonable; and the court has found that he has failed to establish the fourth requirement by its finding that the plaintiff's ingress and egress had not been interfered with.

It is the enjoyment of easements that will be protected by injunction against encroachment or obstruction.

Therefore, it follows that since the appellant does not desire to use and enjoy his easement,

there is nothing for the court of equity to protect and there has been no infringement of appellant's right.

AS CONSIDERED WITH REFERENCE TO APPELLANT'S LITTORAL RIGHTS.

The owner of upland bordering on the shore, is entitled to a reasonable use of the tide lands lying between his upland and deep water in connection with his right of ingress and egress or access to deep water, for the purpose of navigation, but this right is an easement, which must be exercised reasonably and the public cannot be deprived of any right which is not reasonably necessary in connection with said right of ingress and egress or access.

In Columbia Canning Co. vs Hampton, 161 Fed. 60, this court on pages 64 and 65 said:

> "It follows from these authorities that while the owner or locator of lands in Alaska which border upon navigable or tidal waters has, under the general law, the right of access to such waters for the purpose of navigation, he can acquire no right or title in the soil below high water mark, and he can have therefore no right of possession upon which he can base an action against an intruder whom he charges with interfering with and obstructing him in the erection and use of a structure upon the shore below such high water mark. He may have, however, a right of action against an in-

truder who places obstacles on the shore that prevent him from having access to the navigable waters; but that is not this case. The plaintiff does not charge that defendants' structure is a nuisance, or that the defendants are obstructing him in having access to the navigable waters of Lynn Canal. The charge is that defendants are erecting on the shore a structure of piles for a fish trap which will be an obstruction to a similar structure which the plaintiff had commenced to erect. This is not the statement of a cause of action under the general law relating to littoral rights, nor under any statute relating to the waters of Alaska to which our attention has been called."

In Worthen Lumber Mills vs. Alaska Juneau Gold Mining Co. 229 Fed. 966.

On page 970 this court said:

"The court below found that the appellee had need of access to the navigable waters of Gastineau Channel in connection with its mining plant on the upland, and that to avail itself of this right of access it was necessary to construct a wharf covering the whole space in front of said upland, or from the appellant's southerly line to the present Alaska Juneau wharf, and that all of said area is reasonable and necessary to be used in aid of the appellee's ingress and egress to and from such upland. The appellee having, as we found, the right of access to the navigable waters of the

channel, we are not convinced that the court below has by its decree accorded to it a greater or more extensive right than is reasonable under the circumstances."

It is said in the case of Coburn vs. Ames, 52 Cal. 398:

"Assuming as we do for the purpose of this decision that the riparian owner is entitled to wharf out to deep water, it is clear, we think, that this right is in the nature of a franchise or privilege, to be exercised or not by him at his election. He may never see fit to avail himself of the privilege; and it cannot be pretended that while declining to avail himself of his right to wharf out, he is, nevertheless, entitled to the possession of the land below high water mark on the theory that at some future time he may possibly change his mind and desire to erect a wharf. * * and might prevent others indefinitely from engaging in the enterprise. A theory which works this result cannot and ought not to be upheld. * * In this state there are numerous large landed estates, held in private ownership, which front for many miles on the shore of the ocean and on navigable bays and inlets within the ebb and flow of the tide; and if the doctrine were tolerated that each of these proprietors, while himself declining to erect and maintain the docks, piers and wharves which are necessary for the convenience of commerce, nevertheless,

in virtue merely of his riparian rights, might maintain ejections for all such structures erected by others, which, when recovered he might either demolish or close to use in aid of commerce, it is not difficult to see the disastrous consequences which would result from such a doctrine."

And the case of Taylor vs. Commonwealth, 47 S. E. 875 holds as follows:

"In the case before us the property of the plaintiff is used merely for farming purposes. There has not been erected, and as far as the record discloses there is no purpose to erect, any pier or wharf. She is engaged in no business requiring such access to the channel of the stream as cannot be fully enjoyed consistently with every right which the state has exercised, or which it has delegated to others. The commonwealth holds as trustee a vast body of land covered by the flow of the tide, precisely as in the case before us, for the benefit of her citizens. It is not only her right, but her duty, as such trustee, to render this property productive. Is it reasonable that the commonwealth, holding title to the soil, is to be wholly subordinated in the use of it to the use with which another is clothed merely by virtue of being an owner of the adjoining shore, when the rights of each and all can be fully protected without diminution and without hindrance? If the time should come when the river

front of the plaintiff shall be divided into lots, whose owners find it necessary to their profitable enjoyment to erect piers and wharves upon them if they engage in business which shall require exclusive access to the channel of the stream, it may be that a case could then be presented more meritorious than that which we have under consideration, and, in the light of changed conditions, the court may be again called upon to consider the respective rights of the riparian owners and those remaining in the commonwealth, or which have been granted by her to others." * * *

"In conclusion, we are of the opinion that the plaintiff has no title as riparian owner to the water between low water mark and the channel of the river, nor in the soil beneath it; that as riparian proprietor she has certain rights below low water mark as a right to build wharves and of access to the water and a right of way over it to the channel and other purposes which need not now be considered; * * * but that all of these rights may be enjoyed by her to the fullest extent without let or hindrance, diminuation or impairment by reason of the right or privilege granted to and exercised by the Colonial Water Company under the facts as discussed in the record. We are, therefore, of the opinion that there was no error in dismissing the plaintiff's bill, and the decree of the circuit court is affirmed."

In Hedges vs. West Shore R. R. Co. Supra, the court says, after stating the facts and the part heretofore quoted:

> "The plaintiffs have not been deprived of a reasonable method of access under all of the circumstances and hence their riparian rights have not been invaded."

We contend, therefore, that before a littoral proprietor is entitled to relief against one who occupies tide lands abutting his upland, he must show:

First: That he is a littoral proprietor;

Second: That he desires to use the tide lands in connection with his right of access to deep water for the purpose of navigation;

Third: That the use contemplated to be made and the method of availing himself of the use is reasonable; and,

Fourth: That his right of access has been interfered with .

APPELLANT'S ASSIGNMENTS OF ERROR

Error is assigned on account of the court overruling plaintiff's demurrer to the defendant's answer. This was a general demurrer for want of sufficient facts to the whole answer, including the answer in chief which was a general denial of the allegations of the complaint and since this demurrer is to the whole answer and includes the general denial it will not be seriously contended that it was not rightfully overruled.

The other two assignments of error, the one being to the granting of plaintiff's motion for nonsuit and the third and last being to the giving and entering of a judgment, can be considered as one, since under section 1210 Compiled Laws of Alaska, which is as follows, to-wit:

> "Whenever upon the trial it is determined that the plaintiff is not entitled to the relief claimed, or any part thereof, a judgment shall be given dismissing the action, and such judgment shall have the effect to bar another action for the same cause or any part thereof, unless such determination be on account of a failure of proof on the part of the plaintiff, in which case the court may, on motion of such plaintiff, give such judgment without prejudice to another action by the plaintiff for the same cause or any part thereof."

We contend,

First: That although the appellant in the case at bar did offer testimony tending to show that he was a littoral proprietor, he has admitted by his reply that he does not desire to use the tide lands to reach deep water for any purpose;

Second: That the use of appellant's access at this particular place unexplained, considering that he owns 2065 feet of frontage as shown in the case at bar, is unreasonable and without equity;

Third: That he has wholly failed to show that his access has been interefered with; and that, therefore, the case should be affirmed.

APPELLANT'S BRIEF

In appellant's brief, page 5, your attention is directed to the notes and annotations given in connection with section 55 of the Compiled Laws of Alaska.

The first of these notes is undoubtedly the law and the second is held to be the rule. In United States vs. Roth, Al. 257. This opinion is the opinion of the nisi prius court and clearly in conflict with Columbia Canning Co. v. Hampton, Supra.

Gavagan vs. Crary, 2 Al. 370 is also cited, but this case does not involve any of the questions in dispute and there is no mention in the opinion of littoral or riparian rights.

The case of McClusky v. Pacific Coast Co. 160 Fed. 794 is also cited but clearly this case does not bear out the rule laid down in the last note. In said case this court held that the littoral proprietor was entitled to access only, and did not define the meaning of access, as it was not necessary for the decision of the case.

The annotators, as well as the attorneys for the appellant, have overlooked and failed to cite the case of Columbia Canning Co. vs. Hampton, Supra, decided by this court on April 7, 1908.

This case is on all fours with the case under consideration, the only difference being that in the Hampton case the question was raised by demurrer to the allegations in the complaint and in the case at bar by the proof and admissions in the pleadings. In the Hampton case the complaint averred that the

plaintiff was the owner of the uplands; that the defendants had built a structure on the tide lands between said uplands and deep water; that said structure interfered with a similar structure which the complainant intended to build upon said tide waters, allegations as to interference with access being absent in the Hampton case. In the case at bar it was admitted under the pleadings that complainant has never used and does not contemplate to use the tide lands. There is proof offered to show that plaintiff is a littoral proprietor and that platforms had been built on the tide lands between his upland and deep water, so, in the facts raised and in principle, the two cases are identical.

We will not take the time of the court by answering the other Alaska cases in detail, as we consider the matter in dispute fully settled by the Hampton case. The principles laid down in this case have been followed ever since by the trial court in this division of Alaska and the Ninth Circuit Court of Appeals.

Nor do we contend that Yates vs. Milwaukee, and Shiveley v. Bowlby do not in all respects clearly interpret the law which has been subsequently followed, but said cases are in full harmony with the position taken by the trial court.

The appellant attempts a statement defining the littoral proprietor's rights, in which he states that it is an easement, under which he has a right to occupy and use all of the tide lands included between two lines drawn from the boundary to deep water, which he limits by the phrase "used for the

purpose of ingress and egress" which statement of the rights thus limited is undoubtedly a fair statement of his right, except that it should be further limited that the right of ingress and egress should be used for the purpose of navigation in connection with his upland. But what is the advantage of making this broad statement and afterwards limiting it.

The appellant seems to have much difficulty in determining why the lower court granted the motion for a non-suit and does much speculation in this regard. (Appellant's brief, page 16.) The findings of fact incorporated in the judgment place this beyond all conjecture and clearly show that the court granted it for the reason that the defendants had not interfered with plaintiff's right of ingress and egress to and from deep water and for the further reason that plaintiff had never used said right of ingress and egress and did not intend to use said right of ingress and egress. This is admited by the pleadings and the testimony shows that the only use that plaintiff makes and intends to make of his 47 acres of uplands is to reside thereon.

Appellant cites the case of West Coast Improvement Co. v. Windsor, 36 Pac. 341, as bearing out his contention. This case, however, arose under and was decided under a statute, being the tide land act of the State of Washington, passed in 1890, under which the littoral owners were given the first right to purchase the tide lands lying between

their uplands and deep water, except that where improvements had been placed upon tide lands by others than the littoral owners, which were used for the purpose of trade and commerce, the owners of such improvements were given the first right to purchase said tide lands; and the act further provided that the upland owners, as well as the possessors of such tide lands, should be protected in their right to enjoy their possession; and the excerpts quoted from said case were prefaced by the following:

> "Such being the situation and rights of the respondent, we think that a fair interpretation of the statute will show that it was the intent of the law making power that—"

The appellant further cites Miller vs. Mendenhall, 19 Am. St. Rep. 219, which is a Minnesota case and may, therefore, be considered in connection with the case of Union Depot and Transfer Co. vs. Brunswick, 31 Minn. 297; 17 N. W. 626, as well as the case of Hanford vs. St. Paul 43 Minn. 104.

In connection with these cases, it must be borne in mind that in the State of Minnesota there are no tidal waters, all the waters in the State of Minnesota being either rivers such as the Mississippi or waters of Lake Superior, and that in the State of Minnesota the riparian proprietor, for such he is, takes to low water and therefore, has an absolute title to the shore, this being directly op-

posite to the rule in Alaska and this is so regardless of the statement in appellant's brief, that the title to shore lands in Minnesota was in the state. (Appellant's brief, page 31.)

In the case of Union Depot vs. Brunswick, Supra, on page 628, the court says:

> "In this state it is the settled doctrine that the riparian owner has the fee to *low water mark.*"
>
> *Schurmerier vs. R. R. Co.* 10 Minn. 92 (Gill 59);
>
> *Brisbine vs. R. R. Co.* 23 Minn. 114."

In the same case, with reference to the right of access, the court said:

> "It must be understood as giving him the right to do so to the extent necessary to make his abutting property reasonably available at any ordinary stage of the water for the kind of navigation for which the stream is used."

We concede the doctrine as quoted from Hanford vs. St. Paul that the riparian owner has the right to enjoy the improvements made by him in navigable water not inconsistent with the public right; but contend that the right is not limited to the riparian owner.

Ball vs. Slack, 30 Am. St. Rep. 278, is a Pennsylvania case, in which state the rights of the upland or littoral proprietor depend largely upon the terms of the grant under which he obtained title to the land. The grant in consideration extended

to deep water, giving the littoral proprietor title to the shore, under which conditions, he would be entitled to the possession and control of said shore and entitled to remove a trespasser who placed obstructions thereon, unless the same were used in connection with the public right of navigation or fishing.

We are at a loss to know what law will be enacted in Alaska when it becomes a state—whether the future legislatures of Alaska or States of Alaska will enact a law or laws under which the mere occupant of tide lands will be given the first right to purchase from the state or whether the littoral owner will be given that right or whether, as in the State of Washington, the occupant having improvements made for the purpose of commerce and trade will be given that right. That is a matter of speculation which should not influence the court at this time.

We repectfully submit that the law applicable to the case at bar was laid down in the case of Columbia Canning Co. v. Hampton. That the same has been consistently followed by the trial courts in this division and by the Ninth Circuit Court of Appeals in the following cases:

Dalton vs. Hazlett, 182 Fed. 561;
Barron vs. Alexander, Supra.;
Worthen Lumber Mills vs. Alaska Juneau Gold Mining Co. Supra.

That the littoral proprietor's right of access in Alaska has been well defined and established ever

since the decision by this court of the Columbia Canning Co. vs. Hampton and that this cause should for the reasons hereinbefore stated be affirmed.

Respectfully submitted,

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